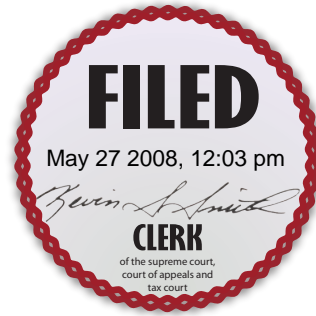


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANTS:

JAY L. LAVENDER
Lavender & Bauer, P.C.
Warsaw, Indiana

ATTORNEY FOR APPELLEES:

CHRISTOPHER D. KEHLER
Rockhill Pinnick LLP
Warsaw, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SHARON DOYLE and)
JOHN DOYLE,)
Appellants/Plaintiffs/Counterdefendants,)
)
vs.)
)
REX AND LINDA SNYDER,)
Appellees/Defendants/Counterplaintiffs.)

No. 43A05-0712-CV-712

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Joe V. Sutton, Judge
Cause No. 43D03-0612-SC-2415

May 27, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

In this appeal from a small claims judgment, tenants Sharon Doyle and John Doyle Jr. (collectively, “the Doyles”) contend that the small claims court erroneously denied their request for the return of their \$1000 security deposit and their claim of constructive eviction. The Doyles further contend that the small claims court erroneously awarded their landlords, Rex and Linda Snyder (collectively, “the Snyders”), \$5426.27 in damages. The Snyders, in turn, request appellate attorney’s fees pursuant to Indiana Appellate Rule 66(E). Concluding that the small claims court’s order was not erroneous, we affirm. Additionally, we decline the Snyders’ request for attorney’s fees.

FACTS AND PROCEDURAL HISTORY

In June of 2004, Sharon Doyle leased Apartment #3 located at 1755 Rozella Road in Warsaw from the Snyders. The Doyles lived in the residence until November 30, 2006.

On July 10, 2006, the Snyders began a renovation of the shower in the Doyles’ apartment.¹ Knowing that the shower would be inoperable during the renovation, the Snyders offered to either allow the Doyles to terminate their lease or to have access to the shower in the vacant Apartment #1, which was located approximately twelve steps from the Doyles’ apartment. The Doyles chose to use the shower in Apartment #1. Completion of the renovation of the shower in the Doyles’ apartment was delayed for numerous reasons. Work was eventually completed on October 5, 2006.

¹ We note that the Doyles were never without a toilet and a sink in their apartment.

On December 1, 2006, the Doyles notified the Snyders, by letter, that they had vacated the apartment. The Doyles requested the return of their \$1000 security deposit. On January 5, 2007, the Snyders replied by letter. The Snyders' letter notified the Doyles that the \$1000 deposit would not be returned because it had been applied as a down payment toward the debt incurred for unpaid rent and damage to the apartment.

On December 18, 2006, Sharon Doyle filed a Notice of Claim in the Kosciusko Superior Court. On January 29, 2007, the Snyders filed a counterclaim against Sharon Doyle alleging that she owed them money for unpaid rent and damage to the apartment. The Snyders subsequently requested permission to join John Doyle Jr. as a party and to amend their counterclaim. The Snyders' amended counterclaim was filed against the Doyles on February 28, 2007, and the matter was set for trial.

On September 17, 2007, the small claims court ruled in favor of the Snyders and ordered that the Doyles "take nothing by way of their complaint (but are entitled to a \$1000 credit for their security deposit)." Appellee's App. p. 11. The small claims court further ordered that the Snyders "shall have a judgment against [the Doyles] jointly and severally on the counter-complaint in the sum of \$5426.27." Appellee's App. p. 11. This appeal follows.

DISCUSSION AND DECISION²

“Our standard of review is particularly deferential in small claims actions, ‘where the trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law.’” *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999) (quoting Ind. Small Claims Rule 8(A)). The parties in a small claims court action bear the same burdens of proof as they would in a regular civil action on the same issues. *Id.* While the method of proof may be informal, the relaxation of evidentiary rules is not the equivalent of relaxation of the burden of proof. *Id.* It is incumbent upon the party who bears the burden of proof to demonstrate that it is entitled to the recovery sought. *Id.*

Here, the Doyles appeal from a general judgment which may be affirmed upon any legal theory supported by the evidence. *Id.* Additionally, the Doyles carried the burden of proof on the claim of constructive eviction before the small claims court, so they appeal from a negative judgment on that issue. *See id.* Thus, the Doyles must show that the judgment is contrary to law. *Id.* A judgment is contrary to law when the evidence is without conflict and leads to but one conclusion which is opposite from that reached by the trial court. *Id.*

² We note that, in making his argument, counsel for the Doyles cites to several unpublished memorandum decisions of this court as controlling authority. We wish to remind counsel that pursuant to Indiana Appellate Rule 65(D), “Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.”

I. Propriety of Small Claims Court's Order

The Doyles contend that the small claims court's order is contrary to the weight of the evidence because it failed to rule on their claim for constructive eviction. In order to prove a claim of constructive eviction, the lessee must prove that an act or omission of the lessor materially deprived the lessee of the beneficial use or enjoyment of the leased property. *Sigsbee v. Swathwood*, 419 N.E.2d 789, 794 (Ind. Ct. App. 1981). The lessee may elect to abandon the property and avoid further obligations under the lease, but if the lessee so elects, the abandonment of the property must occur within a reasonable time after the act or omission. *Id.* A tenant who does not abandon the premises within a reasonable time may not successfully claim constructive eviction. *Ind. State Highway Comm'n*, 169 Ind. App. 611, 620, 349 N.E.2d 808, 814 (1976).

Here, the record establishes that the Doyles' shower was inoperable for approximately three months. During the three months when the shower was inoperable, the Snyders granted the Doyles unlimited access to the shower in Apartment #1 which was unoccupied. The Doyles continued to live in their apartment throughout the shower renovation and did not vacate the apartment until nearly two months after the renovation work was complete. The small claims court's order did not fail to rule on the Doyles' claim of constructive eviction. The small claims court's order explicitly provided that the Doyles "take nothing by way of their complaint." Appellee's App. p. 11. The order is clearly applicable to all claims levied in the Doyles' complaint and, as such, the Doyles' contention that the small claims court failed to rule on their claim of constructive eviction is without merit.

Furthermore, to the extent that the Doyles contend that the small claims court's order was clearly against the weight of the evidence, this contention is merely an invitation for this court to reweigh the evidence. The record established that the Snyders introduced multiple documents supporting their claims of unpaid rent and damage to the apartment which the small claims court, as the trial of fact, was free to believe. Inasmuch as we decline invitations to reweigh the evidence, we conclude that in light of our deference to the small claims court's findings, there was no error. *See Couchman v. Restoration Contractors, Inc.*, 743 N.E.2d 346, 348 (Ind. Ct. App. 2001).

The Doyles next contend that the small claims court committed reversible error in awarding attorney's fees to the Snyders. Indiana courts have recognized the contractual nature of leases and the applicability of the law of contracts to leases. *Sigsbee*, 419 N.E.2d at 796. The construction of a written contract is a question of law. *Boonville Convalescent Ctr., Inc. v. Cloverleaf Healthcare Servs.*, 834 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), *trans. denied*. When interpreting a contract, our paramount goal is to ascertain and effectuate the intent of the parties. *Id.* This requires the contract to be read as a whole, and the language construed so as not to render any words, phrases, or terms ineffective or meaningless. *Id.* Where the terms of a contract are clear and unambiguous, we will not construe the contract or look at extrinsic evidence, but will apply the contractual provisions. *Coates v. Jaye*, 633 N.E.2d 334, 337 (Ind. Ct. App. 1994), *trans. denied*. We also will not add terms that were not agreed upon by the parties. *Id.*

Here, the lease signed by the parties forms the basis of the instant action with respect to an award of attorney's fees. Paragraph fifteen of this lease explicitly provides

that, “In the event of the employment of an attorney by [the Snyders] because of [a] violation by [the Doyles] of any term or condition of this lease, [the Doyles] shall pay such attorney’s fees.” Appellee’s App. p. 74. Therefore, the lease that forms the basis of the instant action provides for attorney’s fees. *Miller v. Geels*, 643 N.E.2d 922, 932 (Ind. Ct. App. 1994), *trans. denied*. The Doyles do not challenge the reasonableness of the attorney’s fees awarded, but only the propriety of the attorney’s fees award in light of the small claims court’s allegedly erroneous order. Having concluded that the small claims court’s order was not erroneous, the only real question about attorney’s fees is whether or not the Snyders are entitled to them, and the lease so provides. *Id.* The small claims court, therefore, did not err.

II. Appellate Attorney’s Fees

The Snyders request that we award them appellate attorney’s fees pursuant to Indiana Appellate Rule 66(E), which provides that this court may assess damages if an appeal is frivolous or in bad faith and that such damages are discretionary and may include attorney’s fees. However, our discretion to award attorney’s fees is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or the purpose of delay. *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). “Additionally, while Indiana Appellate Rule 66(E) provides this Court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal.” *Id.*

Although we ultimately affirm the judgment of the trial court, we decline the Snyders' request for appellate attorney's fees. The record does not support a finding that the Doyles' claims, as levied against the Snyders, while ultimately unsuccessful, were permeated with bad faith, frivolity, or vexatiousness. As such, an award of appellate attorney's fees in favor of the Snyders is unwarranted.

The judgment of the small claims court is affirmed and the Snyders' request for appellate attorney's fees is denied.

BARNES, J., and CRONE, J., concur.